IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN:

SLEIMAN SIMON TAJJOUR
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

No. S37 of 2014

BETWEEN:

JUSTIN HAWTHORNE
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

PLAINTIFFS' WRITTEN SUBMISSIONS

Part I: Certification

1.1. This document is in a form suitable for publication on the Internet.

Part II: Statement of issues arising in the proceedings

2.1. The issues arising in the proceedings are those identified in the questions stated at p. 6 [6] and repeated at p. 32 [6] of the joint Special Case.

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Part III: Notice in accordance with s. 78B *Judiciary Act 1903 (C'th)*

3.1. The plaintiffs have served notices under s. 78B of the *Judiciary Act (C'th)*.

Part IV: Material facts

4.1. In relation to the plaintiff Tajjour, the material facts are set out at p. 5 [1] - p. 6 [5] of the joint Special Case. In respect of the plaintiff Hawthorne, they are set out at p. 30 [1] - p. 32 [5] of the joint Special Case.

Part V: Plaintiffs' argument

A. The implied freedom of communication on governmental and political matters

5.1. There can be no doubt that s. 93X *Crimes Act 1900*, which was introduced by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*, and which commenced on 9 April 2012, places a restriction upon the plaintiffs' ability to associate, and/or communicate, with other persons. Subsection (1) provides:

> A person who:
>
> (a) habitually consorts with convicted offenders, and
>
> (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,
>
> is guilty of an offence.
>
> Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

5.2. The expression "habitually consorts" is, in turn, defined by subsection (2) in the following fashion:

> A person does not
>
> "habitually consort" with convicted offenders unless:
>
> (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
>
> (b) the person consorts with each convicted offender on at least 2 occasions.

5.3. Notably, the expressions, "consort" and "convicted offender", in s. 93W are drafted in an extraordinarily broad fashion:

> "consort" means consort in person or by any other means, including by electronic or other form of communication.
>
> "convicted offender" means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).[1]

5.4. The definition of the expression, "consort", is, of course, circular. However, even putting that to one side, it is apparent immediately that the expression is of tremendous breadth; and that it includes not simply face to face encounters, but also, it would appear, encompasses any form of communication, whether electronic or otherwise. Indeed, the explanatory memorandum observed, "These amendments will ensure that networks established via Facebook, Twitter and SMS will not be immune from these provisions."

5.5. Reference to dictionary definitions is also of no assistance in limiting the breadth of the definition of "consorting", since such definitions are equally broad. So, for example, the Oxford English dictionary defines the verb "to consort" in the following way: "habitually associate with (someone), typically with the disapproval of others."

5.6. Therefore, the offence, as defined, has the potential to restrict both association, and communication between individuals.

5.7. In determining whether an enactment is contrary to the implied freedom of communication on governmental and political matters, the test to be applied has been expressed in the following terms (*Monis v. The Queen* (2013) 87 ALJR 340 at 360 [61] *per* French CJ, *citing with approval Wotton v. Queensland* (2012) 246 CLR 1 at 15 [25] *per* French CJ, Gummow, Hayne, Crennan and Bell JJ.):

> [T]he *Constitution* imposes a restriction on the extent of legislative power to impose a burden on freedom of communication on matters of government or political concern. The now settled questions to be asked when a law is said to have infringed the implied limitation are:

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[1] An indictable offence would be any offence other than a summary offence, *compare* s. 5(1) *Criminal Procedure Act 1986*. Such offences are, generally, offences punishable by a maximum sentence of imprisonment in excess of two years, *see* s. 6 *Criminal Procedure Act 1986*. Frequently, they may be prosecuted either on indictment, or summarily, as can be seen by the lengthy Tables included in Schedule 1 of the *Criminal Procedure Act*. Arguably, there is a temporal limitation upon the conviction by virtue of s. 12(c)(i) *Criminal Records Act 1991* (a reference in a provision to a conviction is taken to be a reference only to any convictions of the person which are not spent).

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s. 128 of the *Constitution* for submitting a proposed amendment to the *Constitution* to the informed decision of the people?

5.8. Section 93X quite plainly imposes a burden upon the freedom of political communication. Not only is the provision designed to capture association, but it extends expressly to communication, both electronic and otherwise (*see* above at [5.3]-[5.4]). The prohibition is apt to capture any form of communication, whether of a political nature or not, thereby burdening the freedom, *compare Attorney-General (SA) v. Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 312 [67] *per* French CJ.

5.9. As in *Monis*, that burden exists, notwithstanding the fact that the provision may apply also to communication, which is not political in nature, *see Monis v. The Queen* (2013) 87 ALJR 340 at 360 [63]-[64] *per* French CJ, *distinguishing Hogan v. Hinch* (2011) 243 CLR 506; at 365 [93], 367 [108] - 369 [122] *per* Hayne J.; at 387 [236] *per* Heydon J.; at 407 [343] *per* Crennan, Kiefel and Bell JJ.

5.10. Significantly, the implied freedom is not limited to communications, say, between electors and their government, or candidates for government (*see Unions NSW v. New South Wales* [2013] HCA 58 at [30] *per* French CJ, Hayne, Crennan, Kiefel and Bell JJ.), but rather,has a much broader extent. Necessarily, the freedom must not be limited solely to communications about representative government, and the election thereof, but must extend further, to encompass communications which permit individuals to form opinions. As was recognised in *Unions* at [29], *quoting with approval Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106 at 138 *per* McHugh J.: "Only by uninhibited publication can the flow of information be secured and the people informed... Only by freedom of speech... and of association can people build and assert political power."

5.11. In this context, it should be noted that the definition of "consorting" extends to virtually any form of human interaction, whether verbal or otherwise, whether immediate or delayed, whether in person or by electronic means. Of course, the range of methods of interaction caught by the definition of the expression "consorting" is a matter, which may properly be taken into account (*see Monis v. The Queen* (2013) 87 ALJR 340 at 361 [68], 362 [73] *per* French CJ.),

although, of course, questions as to the extent of the burden do not arise under the so-called first limb of the *Lange* test (see *Unions NSW v. New South Wales* [2013] HCA 58 at [40] *per* French CJ, Hayne, Crennan, Kiefel and Bell JJ.).

5.12. Furthermore, the provision is neither reasonably appropriate, nor has it been adapted to serve a legitimate end. The difficulty is readily apparent, and is to be seen in the complete absence of any connection between the conduct criminalised and some socially undesirable result. As this Court has recognised, consorting need not have a particular purpose, and, indeed, may be entirely innocent, *Johanson v. Dixon* (1979) 143 CLR 376 at 385 *per* Mason J., *citing with approval Brown v. Bryan* [1963] Tas. SR 1 at 2; *see also Gabriel v. Lenthal* [1930] SASR 318 at 327 *per* Richards J. (act of driving person to court can amount to consorting); *Auld v. Purdy* (1933) 50 WN (NSW) 219 at 219-220 *per* Street J. (living together could amount to consorting); *Clarke v. Nelson* [1936] QLR 17 at 19 *per* Macrossan SPJ (minister of religion seeking to reform criminals could be consorting); *Benson v. Rogers* [1966] Tas. SR 97 at 100-2 *per* Burbury J.

5.13. The Second Reading Speech discloses that the purpose of the legislation was to control crime, generally speaking. It was said by the Hon. David Clarke (Hansard, Legislative Council, 7 March 2012, p. 9093): "It does not extend to chance or accidental meetings, and it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu, or establishing, using or building up criminal networks" (Hansard, Legislative Council, 7 March 2012, p. 9093). However, that is not the way in which the legislation was drafted, and importantly, the legislation is not so limited in its operation.

5.14. Indeed, there is only one defence provided for by statute, namely under s. 93Y of the Act; and it will immediately be seen that it is of very narrow compass:

> The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:
>
> (a) consorting with family members,
>
> (b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
>
> (c) consorting that occurs in the course of training or education,
>
> (d) consorting that occurs in the course of the provision of a health service,

(e) consorting that occurs in the course of the provision of legal advice,

(f) consorting that occurs in lawful custody or in the course of complying with a court order.

5.15. Indeed, the section only exempts from liability communication and association with legal advisors in such a narrow fashion that the effect may be to permit police to impose extraordinary restrictions upon a person's relations with his or her legal advisors and representatives. Such restrictions may interfere in the conduct of trial proceedings. They may also extend to appeals or judicial processes subsequent upon conviction, as well as representation in respect of criminal proceedings after an initial conviction. Such restrictions may create real impediments in cases of trial by jury (*compare* s. 80 *Constitution*) and Chapter III criminal justice.

5.16. Notably, despite the provision of the defence under s. 93Y *Crimes Act 1900*, there is no defence, which excludes communications about government and political matters from criminal liability. The offence provision "applies without distinction to communication of ideas about government and political matters and any other communication." *Monis v. The Queen* (2013) 87 ALJR 340 at 360 [63] *per* French CJ.

5.17. Further, the extent of the "consorting" necessary for it to become criminally relevant is insignificant to say the least. Although not seeking to lay down any definition of the expression "habitually", when discussing proof under the *Police Offences (Consorting) Act 1931 (Vic.)*, it was said that, "To be in the company of reputed thieves on one occasion is not evidence of habit: *to be in their company twice is evidence of the slightest...*" *Brealy v. Buckley* [1934] ALR 371, 372 *per* Duffy J. (emphasis added). To be guilty of an offence, it would be sufficient for a person to consort with two convicted person on two occasions. This imposes a considerable, and unjustifiable, burden upon constitutional freedoms.

5.18. The following sentiments were particularly prescient (*Jan v. Fingleton* (1983) 32 SASR 379 at 380 *per* King CJ):

> Apart from the statute the conduct to be punished may be quite innocent. A person may find, by reason of the family into which he was born and the environment in which he must live, that it is virtually impossible to avoid mixing with people who must be classed reputed thieves. He is to be punished not for any harm which he has done to others, but merely for the company which he has been keeping, however difficult or even disloyal it might be to avoid it. The wisdom and even the justice of such a law may be, and often has been, questioned

5.19. Thus, depending on the individual, and the circumstance in which he finds himself, the service of notices by the police could, conceivably, place a considerable burden upon that individual. It is no exaggeration to say that not only would he be required to desist from consorting with the named individuals, but also that the practical effect might well be that the person concerned has to withdraw from his segment of the community, upon pain of being prosecuted.

5.20. The breath of the definition of "convicted offender", including, as it does, any person convicted of an indictable offence, is of the utmost breadth, since a vast array of offences are indictable, including, for example, the offence of common assault. Nor could it be said that the notice requirement imposes any meaningful restriction on the field of application of s. 93X, since a notice may be issued by any police officer, without the prior sanction of a more senior officer. Such an "official warning" can be given, apparently, even before any form of "consorting" has taken place and so preventing a person from associating, or communicating, with a convicted offender *in futuro,* even if there had been no contact with the convicted offender in the past.

5.21. The justification for the imposition of such burdens was explained in the following terms: "[The legislation is] designed to inhibit a person from habitually associating with persons of the... designated classes, *because the association might expose that individual to temptation or lead to his involvement in criminal activity.*" *Johanson v Dixon* (1979) 143 CLR 376 at 385 *per* Mason J. More recently, the rationale for such legislation has said to be "guilt by association". *South Australia v. Totani* (2010) 242 CLR 1 at 31 [33] *per* French CJ. Such mere supposition, without any empirical foundation whatsoever, and based on no more than the fact of mere association, is an insufficient basis for encroaching upon constitutional freedoms.

5.22. One sees the practical application of this reasoning, for example, in *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980). In that case, it was held that a statute criminalising the loitering in a place with one or more persons, knowing that a narcotic or dangerous drug was being unlawfully used or possessed, was an unconstitutional violation of the freedom of association, because there was no nexus to criminal conduct.

5.23. "[I]f the means employed go further than is reasonably necessary to achieve the legislative object, and are disproportionate to it, invalidity may result." *Monis v. The Queen* (2013) 87 ALJR 340 at 396 [280] *per* Crennan, Kiefel and Bell JJ.; *see also Unions NSW v. New South Wales* [2013] HCA 58 at [44] *per* French CJ, Hayne, Crennan, Kiefel and Bell JJ.: "The enquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so."

5.24. Plainly, less drastic measures would be available to combat the perceived evil, namely by tethering criminal liability to a criminal design. So, for example, s. 7(1)(b) and *Crimes (Criminal Organisation Control) Amendment Act 2012* allows the Supreme Court to declare that an organisation, whether incorporated or otherwise, is a criminal organisation, if it is satisfied, *inter alia*, that its members "associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity". Section 26 thereafter criminalises association. Indeed, the practical effect of s. 26 is, in many respects, remarkably similar to that of the legislation presently under consideration. Significantly, however, in the case of s. 26, the scheme incorporates, as a pre-requisite, a link to criminal activity. Such legislation can more readily be seen as reasonably adapted in the light of the mandated nexus between the organisation, its members, and a criminal purpose.

5.25. For the foregoing reasons, s. 93X places an effective burden upon the implied freedom of communication concerning government and political matters, and does so in a way which offends the *Constitution.*

B. A freedom of association, independent of the implied freedom of communication on governmental and political matters

5.26. The nature and scope of any implied, constitutional freedom of association has proved elusive to date, albeit there appears to have been a general acceptance that such a freedom exists. Largely, the debate has turned on whether freedom of association exists as a free-standing freedom, or whether such so-called freedom is merely ancillary to the implied freedom of political communication. The divergent views, which have been expressed, have not proved to be determinative in any of the decided cases. Accordingly, the issue of whether there exists, in fact, a free-standing freedom remains, in fact, unresolved.

5.27. The stated freedom found acceptance by both McHugh and Gaudron JJ. in *Australian Capital Television Pty. Ltd. v. Commonwealth (Political Advertising Case)* (1992) 177 CLR 106. However, even then, differing views were apparent. Plainly, McHugh J. was of the view that the Australian people enjoyed a freedom of association, but that this freedom was "in relation to federal elections", *Australian Capital Television Pty. Ltd. v. Commonwealth (Political Advertising Case)* (1992) 177 CLR 106 at 227, 232 *per* McHugh J.

5.28. By contrast, Gaudron J. would appear to have accepted a broader role for the freedom of association; her Honour stating, "*The notion of a free society* governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally." *Australian Capital Television Pty. Ltd. v. Commonwealth (Political Advertising Case)* (1992) 177 CLR 106 at 212 *per* Gaudron J.

5.29. Her Honour's reference to the "notion of a free society" was not merely reminiscent of earlier remarks made by Murphy J., but indeed a direct reference. In footnote 5, her Honour referred to Murphy J.'s reasoning in *McGraw-Hinds (Aust.) Pty. Ltd. v. Smith* (1979) 144 CLR 633 at 670 and *Miller v. TCN Channel Nine Pty. Ltd.* (1986) 161 CLR 556 at 581 and approved of the idea that various freedoms "flow[ed] from a democratic society."

5.30. In *Miller v. TCN Channel Nine Pty. Ltd.* (1986) 161 CLR 556 at 581, Murphy J. reasoned that "The Australian *Constitution* must be interpreted against a background of responsible government and democratic principles generally. Implications should be made which would promote such principles rather than those of arbitrary government and tyranny." His Honour continued (at 582) that certain freedoms "are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest." This process of deriving implications from the *Constitution* was said to be based on a need to "avoid pedantic and narrow constructions in dealing with an instrument of government". *Miller v. TCN Channel Nine Pty. Ltd.* (1986) 161 CLR 556 at 583, *quoting with approval Australian National Airways Pty. Ltd. v. Commonwealth* (1945) 71 CLR 29 at 85 *per* Dixon J.

5.31. Murphy J. advocated a similar approach in *McGraw-Hinds*, when his Honour reasoned (at 670) that implications arise from the "nature of our society", and certain freedoms are "indispensable to any free society".

5.32. As recently explained by Heydon J. in *Wotton v. Queensland* (2012) 246 CLR 1 at 17-18 [39], the implied freedom of political communication, which is now universally accepted in the jurisprudence of this Court, found its genesis in both of these judgments of Murphy J., as well as in his Honour's decision in the matter of *Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth* (1977) 139 CLR 54 at 88. As in his later two decisions, Murphy J. held in *Ansett* that *inter alia* "from the concept of the Commonwealth arises an implication of such freedoms, freedoms so elementary that it was not necessary to mention them in the *Constitution*".

5.33. Each of these decisions demonstrates how, in Murphy J.'s view, freedoms may need to be implied, either as a necessary adjunct to matters already enshrined in the *Constitution,* or significantly, because they are "important" to the nature of the Commonwealth as a free and democratic society. While it is conceded that this Court has since been slow to imply freedoms beyond the implied freedom of political communication, nevertheless it cannot be doubted that the process of implication is an orthodox method of constitutional interpretation in Australia. This is demonstrated by the acceptance of the implied freedom of political communication in the *Political Advertising Case*. It is the extent of any implications, and their source, which lie at the heart of the debate.

5.34. This Court thereafter had the opportunity to consider the role of freedom of association in a number of cases. The next such case was *Kruger v. Commonwealth* (1997) 190 CLR 1 *(The Stolen Generation Case)*, but there the Court demonstrated perhaps an even clearer division of views.

5.35. Brennan CJ held (at p. 45) that "no textual or structural foundation for the implication [of a freedom of association] has been demonstrated in this case", but nonetheless concluded ultimately that the provisions impugned by the plaintiffs in that case would not have been invalid. whether or not an implied freedom of association were to be found in the *Constitution.*

5.36. Dawson J. was prepared to accept that a freedom of association existed, to the extent that it is founded upon an implied freedom of communication for political purposes. However, his Honour was not prepared to extend the freedom of association further and, referring to the reasoning of Gaudron J. in the *Political Advertising Case*, concluded (at p. 194) that, "the nature of our society... cannot legitimately be used as a source of constitutional implications." In doing so, his Honour referred to his own opinion in *Theophanous v. Herald and Weekly Times Ltd.* (1994) 182 CLR 104 at 193, which rejected the views of Murphy J. expressed in *McGraw-Hinds*, holding instead that constitutional guarantees operate as a fetter upon the democratic process, and thus did not need not to be included. Indeed, in *Theophanous*, Dawson J. (at p. 193) held further that they were necessarily excluded from the *Constitution.*

> If a constitutional guarantee of freedom of speech or of communication is to be implied, the implication must be drawn from outside the *Constitution* by reference to some such concept as "the nature of our society". That is not an implication which can be drawn consistently with established principles of interpretation.

5.37. These views were supported (at p. 142) by McHugh J., who linked closely the freedom of association with the voting and referendum process.

5.38. Toohey J., on the other hand, concluded that freedom of association existed insofar as it was necessary for the purpose of political communication (at pp. 89-91). His Honour did not consider it necessary to explore a possible, broader relevance of the freedom of association, since there, the plaintiffs' case was directed to the issue of political communication, rather than, as argued, cultural and familial purposes as well, although his Honour did express a concurrence with the views expressed by Gaudron J. (at p. 91).

5.39. Gaudron J. reaffirmed the view that a freedom of association was to be implied. Although Gaudron J. no longer made reference to the reasoning of Murphy J., as her Honour had in the *Political Advertising case*, it is submitted that

Gaudron J.'s reasoning extended beyond the mere protection of "political speech", *see* at p. 114 (emphasis added):

> The implied constitutional freedom of political communication was recognised in cases concerned with laws which, in one way or another, restricted the freedom to communicate information, ideas or opinions with respect to matters which might fall for consideration in the political process. Those cases do not hold that the freedom is confined to political communications and discussions. *Rather, the position is that the Constitution mandates whatever is necessary for the maintenance of the democratic processes for which it provides.*

5.40. The final member of the Bench, Gummow J. (at pp. 156-7) took aim squarely at the views expressed by Gaudron J. in the *Political Advertising case, viz.,* that the notion of a free society may imply certain freedoms. In particular, his Honour concluded that the decisions of *McGinty v. Western Australia* (1996) 186 CLR 140 and *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 meant that the *Political Advertising case* was not authority for a proposition of that breadth. It is submitted that nothing in either case undermines Gaudron J.'s reasoning in the *Political Advertising case*. In this context, it is notable that Gaudron J. joined the joint judgment in *Lange,* without in any way distancing herself from her earlier comments, let alone holding that such earlier remarks were unsupported. Both *McGinty* and *Lange* merely emphasised the fact that an implied freedom must, quite obviously, be implied by virtue of the *Constitution*, that is to say, from its text and structure. Interestingly, the stance taken by Gummow J. seems to have shifted subsequently, particularly when regard is had to his Honour's reference to "the plan laid out in the *Constitution* for the development of a free and confident society." *Thomas v. Mowbray* (2007) 233 CLR 307 at 342 [61] *per* Gummow and Crennan JJ.

5.41. It was then not until *Mulholland v. Australian Electoral Commission* (2004) 220 CLR 181 that this Court, again, had the opportunity to consider whether a freedom of association was implied in the *Constitution.* Gleeson CJ (at p. 201 [42]) did not consider whether such a freedom was implied. McHugh (at p. 225 [113] - 226 [116]) confirmed that there was such an implied freedom, closely linked to the electoral process, but held that the freedom had not been implicated. Supported by Heydon J. (at p. 306 [364]), Gummow and Hayne JJ. concluded (at p. 234 [148]):

> There is no such "free-standing" right to be implied from the *Constitution.* A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v. Australian Broadcasting Corporation* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that

which it may have from a consideration later in these reasons of *Lange* and its application to the present case

5.42. Kirby J. accepted (at p. 278 [286]) that there was an implied freedom, "at least to some extent, so that the constitutional system of representative democracy will be attained as envisaged by Ch. I." Finally, Callinan J. took the view (at p. 297 [335]) that any freedom of association was not implicated. Notably, given the particular complaint made, revolving as it did around the disclosure of political association, there was simply no occasion for the Court to consider whether a freedom of association extended beyond the political sphere. Accordingly, it is submitted that the judgment in *Mulholland* did little to illuminate the breadth of any freedom of association.

5.43. The nature of any implied freedom of association attracted brief mention in *South Australia v. Totani* (2010) 242 CLR 1. While French CJ stated (at p. 29 [31]) that there may be some support for a freedom of association as, an incident of the implied freedom of political communication, his Honour also stated that the matter did not arise for consideration. Gummow J. was prepared to accept (at p. 54 [92]), for the sake of argument, that such a limited freedom of association existed, and referred to his view expressed in *Mulholland.* Relying upon his concurrence in *Mulholland*, Heydon J. (at pp. 99-100 [253]) reiterated his view that there is no free standing right to be implied. Neither Crennan, Kiefel nor Bell JJ. addressed the extent of the assumed, for purposes of argument, freedom of association.

5.44. The final word on freedom of association is to be found in this Court's judgment of *Wainohu v. New South Wales* (2011) 243 CLR 181, in which Gummow, Hayne, Crennan and Bell JJ. (at p. 230 [112]), with the concurrence of French CJ and Kiefel J. (at p. 220 [72]), citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148], concluded that, "Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply."

5.45. Contrary to the views most recently expressed, it is submitted that the concept of freedom of association is not merely the corollary to the implied freedom of political communication. On the contrary, its importance extends beyond the right to be involved in political decision making. It is submitted that the view expressed predominantly by Gummow, Hayne and Heydon JJ. in *Mulholland*, and repeated without further analysis in subsequent decisions, does not give sufficient weight to the important role, which freedom of association plays in the democratic order of a free country, such as the Commonwealth of Australia.[2]

[2] In submitting that the *Mulholland* view should be rejected, the plaintiffs emphasise that the conclusion expressed by Gummow, Hayne and Heydon JJ. did not form part of the *ratio decidendi* of that case. Indeed, the appellant in *Mulholland* did not argue for a freedom of association, which extended beyond its

5.46. Although the concept of a "representative democracy" has, on occasion, been deprecated (*see McGinty v. Western Australia* (1996) 186 CLR 140 at 235-6 *per* McHugh J.), it can nonetheless not be doubted that the *Constitution* does guarantee a democratic order, which is, in turn, guaranteed by institutions chosen by "the People", *see* s. 7 and 24 *Constitution*. "[W]here a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government." *Nationwide News Pty. Ltd. v. Wills* (1992) 177 CLR 1 at 48 *per* Brennan CJ.

5.47. In *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313, the Supreme Court of Canada referred to the intrinsic importance of the freedom of association belonging to the concept of democracy. In a passage at p. 396 [155], which is worth quoting in full, McIntyre J. held:

> Our society supports a multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational and charitable. This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals. Of particular importance is the indispensable role played by freedom of association in the functioning of democracy. Paul Cavalluzzo said, in "Freedom of Association and the Right to Bargain Collectively" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), Weiler and Elliot eds., at pp. 199-200:
>
> > Secondly, it [freedom of association] is an effective check on state action and power. In many ways freedom of association is the most important fundamental freedom because it is the one human right which clearly distinguishes a totalitarian state from a democratic one. In a totalitarian system, the state cannot tolerate group activity because of the powerful check it might have on state power.
>
> Associations serve to educate their members in the operation of democratic institutions. As Tocqueville noted, above, vol. II, at p. 116:
>
> > [Individuals] cannot belong to these associations for any length of time without finding out how order is maintained among a large number of men and by what contrivance they are made to advance, harmoniously and methodically, to the same object. Thus they learn to surrender their own will to that of all the rest and to make their own exertions subordinate to the common impulse, things which it is not less necessary to know in civil than in political associations. Political associations may therefore be considered as

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relationship to federal elections (*see Mulholland v. Australian Electoral Commission* (2004) 220 CLR 181 at 225 [113] *per* McHugh J.). Nor did the conclusion form part of the *ratio* of the subsequent cases, since the statutes under consideration were held to be invalid for other reasons.

> large free schools, where all the members of the community go to learn the general theory of association.

Associations also make possible the effective expression of political views and thus influence the formation of governmental and social policy. As Professor G. Abernathy observed in *The Right of Assembly and Association* (1961), at p. 242:

> ... probably the most obvious service rendered by the institution of association is influencing governmental policy. Concerted action or pressure on governmental agencies has a far greater chance of success than does the sporadic pressure of numerous individuals acting separately.

Freedom of association then serves the interest of the individual, strengthens the general social order and supports the healthy functioning of democratic government.

See also Socialist Party v. Turkey (1999) 27 E.H.R.R. 51 at [41]: "As the Court has emphasised many times, there can be no democracy without pluralism."

5.48. Similar sentiments have been echoed also by this Court: "The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the *Constitution* reserves to them if each person was an island, unable to communicate with any other person." *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 at 72 *per* Deane and Toohey JJ.

5.49. In order to ensure the democratic process, not only must the ability to discuss policy be safeguarded, but indeed also human interaction more generally. "Freedom of assembly is not limited to gatherings for the purpose of protest. It extends to formal and informal assemblies in participation in community life. Gatherings for purposes that are ostensibly less political are also important to citizens for forming opinions and, ultimately, for participating in the democratic process." *Morse v The Police* [2012] 2 NZLR 1 at [110] *per* McGrath J. Rhetorically, one might ask, how can a citizen participate in the democratic process by voicing his opinion, if he has not been given the opportunity to form such an opinion? It is submitted that it is only through association on a familial, social etc. level that such opinions can be formed.

5.50. Although previous authorities require a link between the text and structure of the *Constitution* and any implied power, it is submitted that this criterion says little about what freedoms might be implied, but instead recognises merely the self-evident proposition that there must be a rational basis between the right, which is sought to be implied, and the *Constitution* itself or, one might say, the purpose of the *Constitution*.

5.51. The structure of the *Constitution* demonstrates that it was designed not merely to establish a variety of institutions, and to allocate power among them, but, indeed, to create an environment for the benefit of the people, *Davis v. Commonwealth* (1988) 166 CLR 79 at 110 *per* Brennan J (emphasis added):

> With great respect to those who hold an opposing view, the *Constitution* did not create a mere aggregation of colonies, redistributing powers between the government of the Commonwealth and the governments of the States. The *Constitution* summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures, synthesising their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. *The end and purpose of the Constitution is to sustain the nation.*

5.52. In other words, the *Constitution* provides the backdrop against which the nation can develop. So, to that end, the *Constitution* goes beyond simply establishing institutions, and also guarantees, for example, free trade (s. 92) and religion (s. 116). It is submitted that both of these aspects of human interaction would be entirely illusory, absent freedom of association.

5.53. It is further submitted that it is in this context that the question posed in *Union Steamship Co. of Australia Pty. Ltd. v. King* (1988) 166 CLR 1 at 10 – which is, as yet, unanswered by this Court – assumes significance. In its joint judgment, the Court stated: "Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law... is another question which we need not explore."

5.54. As said, the question was identified, but has not since then been explored in detail, see *Momcilovic v. The Queen* (2011) 245 CLR 1 at 46 [43 n.217] *per* French CJ; 215-6 [562] *per* Crennan and Kiefel JJ.; *South Australia v. Totani* (2010) 242 CLR 1 at 29 [31] *per* French CJ. The above analysis shows why the question posed in *Union Steamship* must be answered in the affirmative. It is today unthinkable that the legislature could enact laws which undermine certain fundamental freedoms, *compare Roach v. Electoral Commissioner* (2007) 233 CLR 162 at 174 [8] *per* Gleeson CJ. It is submitted that the freedom of association is one such fundamental freedom.

5.55. For the foregoing reasons, it is submitted that the structure of the *Constitution* implies that there is a freedom to associate, quite independent of the need to safeguard the democratic process. In conclusion, it is submitted that the *Constitution* guarantees freedom of association, not merely for the purpose of protecting communication about political matters, but more broadly, to protect interaction encompassing familial, social, etc. interaction.

C. The Commonwealth executive's treaty-making power

5.56. Although the Constitution contains no explicit grant of a treaty making power, such a power is considered inherent in the prerogatives of the federal Executive, *see* G Doeker, *The Treaty-making Power in the Commonwealth of Australia* (1966) pp. 50–52, 108–113. In accordance with this power, the executive has signed and ratified the *International Covenant on Civil and Political Rights (ICCPR)* (1966) 999 UNTS 171; 6 ILM 368; [1980] ATS 23. Among the various rights enshrined in the Treaty is, unsurprisingly, freedom of association, *see* Art. 22 *ICCPR*:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

5.57. It is undeniable that a treaty ratified by the executive, but not transposed into municipal law, is of limited relevance. So, for example, it has been said that, "a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law." *Minister of State for Immigration & Ethnic Affairs v. Ah Hin Teoh ("Teoh's case")* (1995) 183 CLR 273 at 287 *per* Mason CJ and Deane J. However, while a treaty not so transposed may not operate as a direct source of rights, it is submitted that it nonetheless operates as a constraint upon the power of the State to enact contrary legislation, much like the implied freedom of communication on governmental and political matters.

5.58. Consequently, it is submitted that the recent decision of the Western Australian Supreme Court in *Wilson v. Minister for Corrective Services (WA)* [2013] WASC 157 at [125] *per* Martin CJ, in which the Court held, "Ratification of an international treaty does not inhibit the legislative capacity of any of the polities within the Australian federation", is wrong.

5.59. The mere act of ratification is of considerable significance, *see Teoh's case* (1995) 183 CLR 273 at 291 *per* Mason CJ and Deane J.:

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.

5.60. Indeed, it is for this reason that this Court held, in *Teoh's case,* that the ratification of a Treaty could give rise to a legitimate expectation that an administrator would act in conformity with the treaty.

5.61. The ability of a State legislature to enact legislation in direct contravention of a treaty obligation[3] would nullify the expression of intention, which is signified by the very act of ratification, made on behalf of the Australian people as a whole. The State would thereby interfere with a power, which is reserved exclusively to the Commonwealth executive by virtue of s. 61 *Constitution.* Such reasoning means that, in the United States, a treaty displaces an otherwise lawful statute of one of its States, *see Ware v. Hylton*, 3 Dall. 199 (1796).[4]

5.62. This is not to say that a person acquires a directly enforceable right by virtue of the act of ratification. It merely limits the legislative power of the State. Only once the treaty has been transposed into municipal law do directly enforceable rights arise. Such a distinction has, of course, been recognised in the jurisprudence of the implied freedom of political communication, *see, e.g., Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

5.63. It should be noted that, in *Webb v. Outtrim* (1906) 4 CLR 356, the Privy Council held that an interference by the legislature of a State with the free exercise of the legislative or executive power of the Commonwealth is not impliedly forbidden by the *Constitution*, unless there is a conflict between the legislation, which conflict may be resolved in accordance with s. 109 of the *Constitution.* However, it is submitted that the force of that reasoning has been thoroughly undermined by subsequent events. The Earl of Halsbury held then (at pp. 358-9) that, unlike in the United States, where a statute may be declared unconstitutional, a statute, which has been validly enacted, had to be enforced.

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[3] This is to be distinguished from the situation involving customary international law, where there has been no expression of the will of the people. In such a case, no limitation is placed upon the State legislature, *see Zhang v. Zemin* (2010) 79 NSWLR 513 at 535 [125] *per* Spigelman CJ, *citing with approval Polites v. Commonwealth* (1945) 70 CLR 60 at 68-69, 74-77, 79, 81.

[4] Chase J. reasons that treaties were supreme, by virtue of the act of confederation, and hence the conferral of power, even prior to the establishment of the Constitution and Art. 6, which expressly provides for such "supremacy", *see* at p. 236.

However, subsequent events have shown this to be erroneous, and a State statute may, for example, be declared invalid, because it seeks to confer a power upon a Court, which power is incompatible with its role by virtue of Ch. III Constitution, *see Kable v. DPP (NSW)* (1996) 189 CLR 51. Indeed, almost as soon as the decision in *Webb v. Outtrim* was delivered, it came in for a scathing attack from this Court, *see Baxter v. Commissioner of Taxation (NSW)* (1907) 4 CLR 1087. Therefore, the Privy Council's decision ought not to be treated as persuasive authority against the submission now advanced.

5.64. Accordingly, it is submitted that the State legislature exceeded its legislative authority by enacting s. 93X *Crimes Act 1900 (NSW)*, which is contrary to the treaty obligation contained in Art. 22 *ICCPR*.

Part VI: Applicable constitutional provisions and statutes

6.1. See Annexure A.

Part VII: Orders sought

7.1. The plaintiffs seek the following orders:

a. A declaration that s. 93X *Crimes Act 1900 (NSW)* is invalid.

b. An order that the defendant pay the plaintiffs' costs.

Part VIII: Estimate of time

8.1. The plaintiffs estimate that they will require two hours to present their argument.

Dated: 27 March 2014

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ANNEXURE A

LEGISLATIVE INSTRUMENTS REFERENCED IN PLAINTIFFS SUBMISSIONS

Statement of currency

The following constitutional provisions and statutes are still in force, in the same form as at the date of these submissions

Table of provisions

Legislative Instrument	Annexed Provisions	Page Ref
Crimes Act 1900 (NSW)	Sections 93W, 93X and 93Y	1-3
The Constitution 1900 (Cth)	Sections 7, 24 and 61	4-7

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New South Wales

Crimes Act 1900 No 40

Status information

Currency of version

Current version for 31 January 2014 to date (generated 5 March 2014 at 13:53).
Legislation on the NSW legislation website is usually updated within 3 working days.

Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

Does not include amendments by:

Sec 310L of this Act (sec 310L repeals Part 6B on 13.9.2016)
Police Legislation Amendment (Special Constables) Act 2013 No 56 (not commenced)

See also:

Crimes Amendment (Possession or Discharge of Firearms in Commission of Offences) Bill 2012 [Non-government Bill: Hon Robert Borsak, MLC]
Crimes Amendment (Zoe's Law) Bill 2013 [Non-government Bill: Revd the Hon F J Nile, MLC]
Crimes Amendment (Zoe's Law) Bill 2013 (No 2) [Non-government Bill: Mr C E Spence, MP]
Crimes Amendment (Intoxication) Bill 2014
Crimes Amendment (Female Genital Mutilation) Bill 2014
Crimes Amendment (Provocation) Bill 2014 [Non-government Bill: Revd the Hon F J Nile, MLC]

93U Alternative verdicts

(1) If, on the trial of a person for an offence under section 93T (1A), (2), (3), (4) or (4A), the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under section 93T (1), it may find the accused not guilty of the offence charged but guilty of an offence under section 93T (1), and the accused is liable to punishment accordingly.

(2) If, on the trial of a person for an offence under section 93T (1), (1A) or (4A), the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under section 93TA, it may find the accused not guilty of the offence charged but guilty of an offence under section 93TA, and the accused is liable to punishment accordingly.

Division 6 Unlawful gambling

93V Offence of conducting unlawful gambling operation

(1) A person who conducts an unlawful gambling operation is guilty of an offence.

Maximum penalty: 1,000 penalty units or imprisonment for 7 years (or both).

(2) For the purposes of subsection (1), ***an unlawful gambling operation*** means an operation involving at least 2 of the following elements (one of which must be paragraph (d)):

(a) the keeping of at least 2 premises (whether or not either or both are gambling premises) that are used for the purposes of any form of gambling that is prohibited by or under the *Unlawful Gambling Act 1998*,

(b) substantial planning and organisation in relation to matters connected with any such form of prohibited gambling (as evidenced by matters such as the number of persons, and the amount of money and gambling turnover, involved in the operation),

(c) the use of sophisticated methods and technology (for example, telephone diverters, telecommunication devices, surveillance cameras and encrypted software programs) in connection with any such form of prohibited gambling or in avoiding detection of that gambling,

(d) a substantial loss of potential revenue to the State that would be derived from lawful forms of gambling.

(3) In any proceedings for an offence under this section, evidence that persons have been in regular attendance at premises suspected of being used for the purposes of any form of gambling that is prohibited by or under the *Unlawful Gambling Act 1998* is relevant to the matters referred to in subsection (2) (a) or (b).

(4) In this section:

conduct includes organise or manage.

gambling premises has the same meaning as in the *Unlawful Gambling Act 1998*.

Division 7 Consorting

93W Definitions

In this Division:

consort means consort in person or by any other means, including by electronic or other form of communication.

convicted offender means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).

93X Consorting

(1) A person who:

(a) habitually consorts with convicted offenders, and

(b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) A person does not ***habitually consort*** with convicted offenders unless:

(a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and

(b) the person consorts with each convicted offender on at least 2 occasions.

(3) An ***official warning*** is a warning given by a police officer (orally or in writing) that:

(a) a convicted offender is a convicted offender, and

(b) consorting with a convicted offender is an offence.

93Y Defence

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

(a) consorting with family members,

(b) consorting that occurs in the course of lawful employment or the lawful operation of a business,

(c) consorting that occurs in the course of training or education,

(d) consorting that occurs in the course of the provision of a health service,

(e) consorting that occurs in the course of the provision of legal advice,

(f) consorting that occurs in lawful custody or in the course of complying with a court order.

The Constitution

Printed on 1 January 2012

together with

Proclamation Declaring the Establishment of the Commonwealth

Letters Patent Relating to the Office of Governor-General

Statute of Westminster Adoption Act 1942

Australia Act 1986

with

Overview, Notes and Index

by the

Attorney-General's Department
and
Australian Government Solicitor

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part II—The Senate

7 The Senate

T he Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

B ut until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

U ntil the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State,[5] but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

T he senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

8 Qualification of electors

T he qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

9 Method of election of senators

T he Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament

Part III—The House of Representatives

24 Constitution of House of Representatives

T he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

T he number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

B ut notwithstanding anything in this section, five members at least shall be chosen in each Original State.

25 Provisions as to races disqualified from voting

F or the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Chapter II—The Executive Government

61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62 Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63 Provisions referring to Governor-General

The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64 Ministers of State

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.